

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

Docket number 158,035:

- (1) Whether the Administrative Law Judge erred in listing the date January 12, 1999, on page ten (10) of his opinion.
- (2) Whether the Administrative Law Judge erred in awarding claimant 1.7 weeks permanent partial disability for the period November 18, 1991 to November 27, 1991 at the rate of \$66.40 per week instead of \$128.06 per week as alleged by the claimant.
- (3) Whether the Administrative Law Judge erred in awarding 17.43 weeks permanent partial disability for the period March 16, 1992 through July 16, 1992 at the rate of \$72.47 per week when claimant alleges the amount should be \$147.18 per week.
- (4) Whether the Administrative Law Judge erred in giving respondent credit for having paid 82.71 weeks temporary total disability compensation rather than 70.71 weeks temporary total compensation as alleged by claimant.
- (5) Claimant's average weekly wage.
- (6) Claimant's rate of temporary total disability compensation, if an alteration is made in claimant's average weekly wage.
- (7) Nature and extent of claimant's injury and/or disability.
- (8) The liability of Kansas Workers Compensation Fund, if any.

Docket number 165,821:

- (1) The nature and extent of claimant's injury and/or disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary file herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant has listed a multitude of issues in Docket Number 158,035 which the Appeals Board will attempt to handle in order.

The date, January 12, 1999, listed in the Award of the Administrative Law Judge on page ten (10) appears to represent the final payment date in the claimant's 415 week Award. Claimant's allegation that the Judge intended January 22, 1992, is not supported by the evidence. As such, claimant's allegations of a typographical error in the Order of the Administrative Law Judge is dismissed.

Claimant's Petition for Review, paragraphs b and c appear to contain the same issue restated. Claimant was awarded 1.7 weeks permanent partial disability for the period November 18, 1991 through November 27, 1991 at the rate of \$66.40 per week. Claimant contends a sixty-three percent (63%) work disability would equate to \$128.06 per week and that the Administrative Law Judge erred in awarding the lesser amount. During this period of time claimant continued working for respondent at a comparable wage. In Lee v. Boeing Military Airplanes, 21 Kan. App. 2d 365, 899 P.2d 516 (1995), the Court of Appeals, in affirming the Workers Compensation Appeals Board, found that granting a functional impairment to a claimant prior to a layoff date, followed by work disability after the lay-off date, was appropriate when dealing with the presumption of no work disability in K.S.A. 44-510e(a). The Appeals Board finds the Award of the Administrative Law Judge in this matter granting claimant permanent partial disability compensation at the functional level for the period November 18, 1991 through November 27, 1991 rather than at the work disability level is appropriate. This finding by the Administrative Law Judge is supported by the evidence and the Appeals Board affirms same.

Claimant next raises the issue of the amount of permanent partial disability due for the period March 16, 1992 through July 16, 1992. Before the Appeals Board can render its decision on this issue, a discussion of the facts pertinent to this case are appropriate. In June, 1990 while working for the respondent, claimant fell off the front end of a truck suffering injury to his back, hips and legs. After alleging additional injury on January 29, 1991 and May 5, 1991 claimant ceased working for respondent on May 5, 1992. On July 16, 1992, claimant was awarded vocational rehabilitation, including temporary total disability compensation at the statutory rate. The Administrative Law Judge, in his Award, granted claimant permanent partial disability on a functional level for the period March 16, 1992 through July 16, 1992. In following the rationale set forth in Lee v. Boeing, *supra*, a more appropriate award would have been permanent partial disability on a functional level from March 16, 1992 through and including May 5, 1992. For the period May 6, 1992 through and including July 15, 1992, claimant would be eligible for a work disability of sixty-three percent (63%) as awarded by the Administrative Law Judge at the rate of \$137.18 per week. The Appeals Board finds the Administrative Law Judge, in his Award, did err in the computations of claimant's permanent disability and grants claimant permanent partial disability at the rate of sixty-three percent (63%) whole body impairment for the period May 6, 1992 through and including July 15, 1992; a period of ten (10) weeks at the rate of \$137.18 per week for a total of \$1,371.80. The section of the Award of the Administrative Law Judge granting claimant permanent partial disability on a functional basis for the period March 16, 1992 through and including May 5, 1992 at the rate of \$72.47 per week, is affirmed.

The claimant next alleges the Administrative Law Judge erred in granting respondent credit for paying 82.71 weeks temporary total disability compensation at the rate of \$214.17 per week in the total amount of \$17,718.43. Claimant alleges he was paid a total of 70.71 weeks temporary total disability compensation in the total amount of \$14,928.33. The Appeals Board notes, at the regular hearing, respondent stated on the record it had paid 82.71 weeks temporary total disability compensation at the above rate. No objection was raised by claimant at that time. It should be further noted that claimant, in his submission letter, acknowledged payment by the respondent of 82.71 weeks temporary total disability compensation at the above rate. Again, no objection was raised

by claimant. This matter was not made an issue before the Administrative Law Judge at any time by claimant.

Claimant alleges this issue was raised during regular hearing when claimant was questioned regarding the amount of temporary total disability compensation actually paid. A review of the regular hearing transcript shows the issue being contested by claimant at that time, dealt with claimant's average weekly wage and not with the number of weeks of temporary total disability compensation due and owing.

K.S.A. 44-555b(a) as amended by S.B. 59 (1995), states in part:

“The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.”

The Appeals Board is the trier of fact, issuing decisions upon de novo review of the record upon questions of law and fact raised, before the Administrative Law Judge. An issue not presented to the Administrative Law Judge would not properly be before the Appeals Board, as it would be in violation of the language of K.S.A. 44-555b. As such, the issue raised by the claimant regarding the number of weeks of temporary total disability compensation is not properly before the Appeals Board and is dismissed.

The Appeals Board must next decide claimant's average weekly wage. Claimant contends the respondent's policy of working claimant between eight (8) and nine and one-half (9½) hours per day, with regular pay up to forty (40) hours per week and time and one-half beyond that, would justify claimant being paid nine and one-half (9½) hours per day straight time, times five (5) days, with overtime computed for any amounts over and above at time and one half.

K.S.A. 44-511(b)(4) states in part:

“(iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks”

In this instance, claimant was paid straight-time for forty (40) hours per week with time and one-half paid beyond the forty (40) hour week. In computing claimant's average weekly wage the Administrative Law Judge allowed claimant \$280.00 straight time or forty (40) hours per week times \$7.00 per hour, claimant's hourly rate. The Administrative Law Judge also granted \$43.09 in overtime which was claimant's total overtime for the twenty-six (26) weeks preceding the date of injury of January 29, 1992. In dividing claimant's total overtime by twenty-four (24) weeks, the Administrative Law Judge gave credit to claimant for two (2) weeks when claimant was off work and not available. This computes to an average weekly wage of \$323.09 per week.

In computing claimant's average weekly wage, the Administrative Law Judge further added \$7.20 per week, which represents the total amount of claimant's bonus for the preceding year, divided by fifty-two (52) weeks. K.S.A. 44-511(a)(2) defines the term "additional compensation" to include:

"(B) any cash bonuses paid by the employer within one year prior to the date of the accident, for which the average weekly value shall be determined by averaging all such bonuses over the period of time employed prior to the date of the accident, not to exceed 52 weeks Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued."

Claimant's average weekly wage, during the time claimant continued to be employed by the respondent, would not include the amount of bonus in claimant's total compensation package, as this would be part of claimant's additional compensation. Additional compensation would not be included in the average weekly wage until such time as claimant's additional compensation was discontinued. As claimant was eligible for a bonus through May 5, 1992, the last day claimant worked for respondent, such additional remuneration would not be included in claimant's average weekly wage. The Appeals Board, therefore, finds claimant's average weekly wage through May 5, 1992, claimant's last day worked for respondent, would be \$323.09 per week.

Subsequent to claimant's termination of employment, he would no longer be eligible for the additional compensation originally provided by respondent. Thus, the \$7.20 per week representing claimant's bonus package, as well as the \$21.72 per week additional compensation for health and life insurance, would then be added to claimant's average weekly wage, to create a post-employment average weekly wage of \$352.01 per week. The Appeals Board notes the Administrative Law Judge, in what appears to be a typographical error, found claimant's final average weekly wage to be \$352.10 per week. The Appeals Board, herein, awards claimant benefits based on an average weekly post-employment wage of \$352.01 per week.

The Appeals Board next will decide the issue of the nature and extent of claimant's injury and/or disability.

In reviewing the sixty-three percent (63%) whole body work disability in the Award in Docket No. 158,035, none of the parties disagree to the percentages reached by the Administrative Law Judge.

The Kansas Workers Compensation Fund contends that claimant's entire disability extends from claimant's original injury on June 6, 1990 in Docket Number 158,036, an injury which was settled between claimant and respondent on October 7, 1993.

K.S.A. 44-501 and K.S.A. 44-508(g) make it the claimant's burden of proof to establish, in proceedings under the Workers Compensation Act, claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability. The trier of fact is not bound by the medical evidence presented and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The deposition of Dr. Edward J. Prostic supports claimant's contentions of an aggravation of a pre-existing condition on January 29, 1991. Dr. Prostic opined that the claimant suffered an aggravation of a pre-existing spinal stenosis on that date, resulting in a substantial increase in his functional impairment. Dr. Prostic felt claimant had a three to five percent (3-5%) whole body functional impairment prior to the January 1991 incident, and a thirty percent (30%) whole body functional impairment thereafter. The Appeals Board finds, based upon the evidence presented, that claimant did suffer an aggravation of a pre-existing condition on January 29, 1991, and the contention of the Workers Compensation Fund that claimant's liability extends solely from the 1990 incident is rejected. The Appeals Board further affirms the Award of the Administrative Law Judge granting claimant a sixty-three percent (63%) whole body permanent partial work disability as a result of the injuries which occurred on January 29, 1991.

The Appeals Board must next decide the liability of the Kansas Workers Compensation Fund for the injury occurring on January 29, 1991.

The purpose of the Workers Compensation Fund is to encourage employment of persons handicapped as a result of specific impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 44-567(a); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765 (1976).

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge."
K.S.A. 44-567(b)

An employee is handicapped under the Act if the employee is "afflicted with an impairment of such a character as to constitute a handicap in obtaining or retaining employment." Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980). The employer has the burden of proving that it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

In June 1990, claimant suffered injury to his hip and lower back when he fell off the front end of a truck. On January 29, 1991, claimant again hurt his back, hips and legs, missing work until November 17, 1991. Claimant underwent surgery with Dr. Tenny on May 10, 1991 and again August 10, 1991. Dr. Prostic, a board-certified orthopedic surgeon, is the only medical provider to testify in this matter. Dr. Prostic found that claimant suffered a definite aggravation of a pre-existing condition on January 29, 1991. Dr. Prostic increased claimant's impairment rating from the three to five percent (3-5%) to

the body as a whole before January 1991, to thirty percent (30%) to the body as a whole subsequent to the injury. Dr. Prostic also found that claimant suffered from a pre-existing condition of underlying spinal stenosis prior to the January, 1991 injury. The evidence in the record, including the testimony of claimant, convinces the Appeals Board that claimant was a handicapped employee prior to January 29, 1991, and the respondent had knowledge of claimant's handicap. The only medical testimony dealing with the liability of Kansas Workers Compensation Fund is that of Dr. Prostic who found that, but for claimant's pre-existing degenerative disc disease and spinal stenosis, claimant would not have sustained the injury of January 29, 1991. As such, the Award by the Administrative Law Judge against the Kansas Workers Compensation Fund and in favor of respondent and its insurance carrier for one hundred percent (100%) of all compensation benefits found due and owing to claimant as well as one hundred percent (100%) of the medical and hospital expenses, temporary total disability compensation and vocational rehabilitation expenses paid by respondent and its insurance carrier is appropriate, based upon the evidence and the Appeals Board adopts said award as its own.

**Docket Number 165,821
Alleged injury date May 5, 1992.**

Claimant alleges additional aggravation to his back for the period April 27, 1992 through May 5, 1992. Subsequent to claimant's accidental injury of January 29, 1991, he was off work for a considerable period of time and underwent two (2) back surgeries. He did return to work for a short period until March 16, 1992. Later upon his return to work he noted increased symptomatology at work with specific incidences on April 27, 1992, and May 5, 1992. The incidences on these two dates appeared to be rather insignificant and, in the opinion of the Appeals Board, did not cause claimant any permanent aggravation of his condition. As such, the Appeals Board finds claimant did not sustain additional permanent injury during the period April 27, 1992 through May 5, 1992, but merely temporarily aggravated this condition and increased his pain, with no increase in permanency.

The Appeals Board further finds that the Administrative Law Judge in awarding compensation, granted respondent, its insurance carrier and the Kansas Workers Compensation Fund a credit for the prior Award granted claimant in Docket Number 158,036 for claimant's accidental injury of June 6, 1990. A formal Award was entered in that matter on October 7, 1993, based upon a four percent (4%) whole body permanent partial disability, and based upon an average weekly wage of \$400.00. The Appeals Board finds the respondent and its insurance carrier and the Kansas Workers Compensation Fund are entitled to a one hundred percent (100%) credit of \$10.67 per week towards claimant's permanent partial disability compensation awarded in Docket Number 158,035, pursuant to K.S.A. 44-510a.

Claimant further alleges the Administrative Law Judge, in the Award section of his Award, failed to grant claimant the sum of \$265.00 from respondent, its insurance company and the Kansas Workers Compensation Fund to Rentmasters for transportation to secure medical treatment. Claimant also contends the Administrative Law Judge neglected to specifically state in the Award section that claimant be reimbursed the sum of \$481.78 granted to him from the Administrative Law Judge's Order dated July 16, 1992.

Respondent, insurance carrier and the Kansas Workers Compensation Fund do not contest claimant's contentions. Therefore, the findings of the Administrative Law Judge in his Award of April 10, 1995, paragraph 4, page 7, shall be affirmed and included in the Award section of this Award, per claimant's request.

AWARD DOCKET NO. 158,035

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the claimant, Albert Bond, is granted an award against the respondent Killough, Inc., and Continental Insurance Company, its insurance carrier, and the Kansas Workers Compensation Fund in Docket Number 158,035, for an injury date of January 29, 1991, as follows:

Claimant is awarded temporary total compensation for the period January 30, 1991 to November 17, 1991 at the rate of \$215.40 based upon an average weekly wage of \$323.09 and claimant is awarded temporary total disability compensation for the period November 28, 1991 to February 1, 1992 for a total of 51 weeks temporary total disability compensation. Claimant is further awarded 6.14 weeks temporary total compensation at the rate of \$215.40 per week for the period February 1, 1992 to March 16, 1992; plus 12.86 weeks temporary total compensation at the rate of \$234.69 per week based upon an average weekly wage of \$352.01 for the period July 16, 1992, to October 14, 1992, during claimant's vocational rehabilitation making a total award of temporary total disability compensation in the amount of \$15,326.07. Claimant is entitled to additional permanent partial disability compensation based upon a 35% whole body functional impairment for 1.71 weeks at the reduced rate of \$64.72 and in the sum of \$110.67 for the period January 29, 1991, and November 17, 1991 to November 28, 1991, plus 7.29 weeks permanent partial disability compensation at the reduced rate of \$64.72 per week for the period March 16, 1992 to and including May 5, 1992 in the sum of \$471.81, plus 10.14 weeks permanent partial general body work disability based upon an average weekly wage of \$352.01 for a 63% whole body permanent partial general body work disability at the reduced rate of \$137.18 (\$147.85 minus \$10.67) in the amount of \$1,391.01, plus 292 weeks permanent partial general body work disability in the reduced rate of \$137.18 and in the sum of \$40,056.56 for the period October 14, 1992 to May 20, 1998; plus 33.86 weeks permanent partial general body work disability at the unreduced rate of \$147.85 in the sum of \$5,006.20 for the period May 20, 1998 to January 12, 1999 for a total award of \$62,362.32.

As of October 9, 1995, there shall be due and owing claimant temporary total disability compensation as indicated above in the total amount of \$15,326.07 plus 1.71 weeks permanent partial disability compensation at the weekly rate of \$64.72 in the amount of \$110.67, plus 7.29 weeks permanent partial general body disability compensation at the reduced rate of \$64.72 in the amount of \$471.81 plus 10.14 weeks permanent partial general body work disability at the reduced rate of \$137.18 per week in the amount of \$1,391.01, plus 155.86 weeks permanent partial disability compensation at the reduced rate of \$137.18 in the sum of \$21,380.87 for a total due of \$38,680.43 which is ordered paid in one lump sum minus amounts previously paid. Thereafter, claimant is entitled to 136.14 weeks permanent partial general body work disability at the reduced rate of \$137.18 in the sum of \$18,675.69, followed thereafter by 33.86 weeks permanent partial

disability compensation at the unreduced rate of \$147.85 in the sum of \$5,006.20 until fully paid or further order of the Director.

Claimant is further awarded the sum of \$265.00 to be paid to Rentmasters for transportation to secure medical treatment per the Order of the Administrative Law Judge.

Claimant is further awarded the sum of \$481.78 pursuant to the Order of the Administrative Law Judge, as reimbursement for medical expenses paid by claimant.

Claimant is further awarded up to \$350.00 unauthorized medical upon presentation of an itemized statement verifying same.

Respondent and its insurance carrier and the Kansas Workers Compensation Fund are further granted a credit for the prior Award in Docket Number 158,035 for a date of injury of June 6, 1990, as above calculated.

The respondent and its insurance carrier are further granted reimbursement from the Kansas Workers Compensation Fund for 100% of all compensation awarded herein to the claimant for the injury of January 29, 1991, as well as 100% of medical and hospital expenses, temporary total disability compensation and vocational rehabilitation expenses previously provided to claimant by the respondent.

Claimant's contract for employment is made a part of the record and is appropriate so long as it is not in contravention of K.S.A. 44-536.

Additional findings and orders of the Administrative Law Judge, so long as they are not in contravention to the findings contained herein, are hereby adopted by the Appeals Board.

AWARD DOCKET NO. 165,821

In Docket Number 165,821 the date of injury alleged through May 5, 1992, claimant is herein denied award against respondent and its insurance carrier and against the Kansas Workers Compensation Fund.

The fees necessary to defray the expense of the administration of the Workers Compensation Act shall be assessed against the Kansas Workers Compensation Fund as follows:

Hostetler & Associates, Inc.	\$497.60
Richard Kupper & Associates	\$534.20
Appino & Achten Reporting Service	\$499.20
Gene Dolginoff Associates	\$316.05

The fees necessary to defray the expense of the administration of the Workers Compensation Act shall be assessed against the claimant as follows:

Appino & Achten Reporting Service	\$184.00
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(deposition of Linda Bond)

IT IS SO ORDERED.

Dated this ____ day of November 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, Kansas
Kip A. Kubin, Overland Park, Kansas
Frank A. Caro, Jr., Kansas City, Missouri
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director